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The Michigan Abortion Refusal Act

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LEGISLATIVE NOTES:

THE MICHIGAN ABORTION REFUSAL ACT

Since the United States Supreme Court handed down the landmark decisions of *Roe v. Wade*¹ and *Doe v. Bolton*,² which placed constitutional limitations on state regulation of abortions, efforts have been made on the federal and state levels to blunt the effect of those cases.³ One prevalent reaction has been the enactment of state "conscience clause" legislation, such as the Michigan Abortion Refusal Act,⁴ which seeks to extend to all hospitals the right to refuse admission of abortion patients.⁵

This legislative note will consider whether the Michigan conscience clause is legally necessary to ensure the right it seeks to establish for (1) "denominational" hospitals, (2) "private" hospitals,⁶ and (3) "public" hospitals.⁷ In addition, the constitutionality of the Act as to each class of hospital will be assessed in light of the standards enunciated by the Supreme Court in *Wade* and *Bolton*.

I. GENERAL PROVISIONS

The Michigan Abortion Refusal Act was passed by the Michigan

¹ 410 U.S. 113 (1973).

² 410 U.S. 179 (1973).

³ State legislatures have recently expressed their hostility to the *Wade-Bolton* decisions. See NEB. REV. STAT. § 28-4,143 (Supp. 1973), which states that the following [abortion regulation] provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn.

Id.

More hostile yet has been the reaction of the Utah legislature, which passed its Abortion Act, UTAH CODE ANN. §§ 76-7-301 to 76-7-317 (Supp. 1974), in a form substantially unchanged from that found unconstitutional under *Wade* and *Bolton* just three months earlier in *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973).

One particular significant mode of resistance to the *Wade-Bolton* holdings is the effort to circumvent these decisions by adding the proposed "Human Life" amendments to the United States Constitution. See H.R.J. Res. 261, 93d Cong., 1st Sess. (1973); S.J. Res. 119, 93d Cong., 1st Sess. (1973).

⁴ MICH. COMP. LAWS ANN. §§ 331.551-.556 (Supp. 1974).

⁵ The right of an individual to refuse to participate in an abortion on grounds of religious objection, which is also encompassed by the Michigan act, is independently protected by the first amendment guarantee of freedom of religion.

⁶ A "private" hospital is by definition an institution which is not subject to the provisions of the fourteenth amendment for lack of a "state action" jurisdictional nexus. See notes 45-49 and accompanying text *infra*.

⁷ A "public" hospital includes all institutions which satisfy the traditional "state action" jurisdictional nexus to make them subject to the provisions of the fourteenth amendment. See notes 50-69 and accompanying text *infra*.

Legislature in December, 1973, eleven months after the Supreme Court's decisions in the *Wade* and *Bolton* cases. The Act authorizes any "hospital, clinic, institution, teaching institution, or other medical facility" to refuse "to admit a patient for purposes of performing an abortion."⁸

The Act also authorizes all persons employed by or connected with any of the above institutions to refuse to participate in an abortion on "professional, moral, ethical, or religious"⁹ grounds.

II. PRIOR LEGISLATIVE AND JUDICIAL TREATMENT OF ABORTION REFUSAL

A. In Michigan

The passage of the Michigan Abortion Refusal Act in 1973 was Michigan's first statutory attempt to blunt the impact of the *Wade* and *Bolton* holdings on the state's abortion laws. Before the Supreme Court's pronouncements in *Wade* and *Bolton*, abortions were illegal in Michigan, except as necessary to preserve the life of the pregnant woman.¹⁰ After the Court's holdings rendered such prohibitions unconstitutional, the Michigan Supreme Court chose to read the *Wade* and *Bolton* criteria into the state's existing abortion statute, instead of simply invalidating the Act.¹¹

B. In Other States

Thirty-seven states currently have conscience clause legislation permitting hospitals to refuse admission of abortion patients,¹² but the

⁸ MICH. COMP. LAWS ANN. § 331.551 (Supp. 1974).

⁹ MICH. COMP. LAWS ANN. § 331.552 (Supp. 1974). The individual's right to refuse on religious grounds is already protected by the first amendment. See note 5 *supra*. However, the constitutionality of refusal by individuals pursuant to the Act is a question not treated in this note.

¹⁰ MICH. COMP. LAWS ANN. § 750.14 (1968).

¹¹ *People v. Bricker*, 389 Mich. 524, 530, 208 N.W.2d 172, 175 (1973).

¹² ALASKA STAT. § 11.15.060 (Supp. 1973); ARIZ. REV. STAT. ANN. § 36-2151 (Supp. 1973); ARK. STAT. ANN. § 41-310 (Supp. 1973); CAL. HEALTH AND SAFETY CODE § 25955 (West Supp. 1974); COLO. REV. STAT. ANN. § 46-6-104 (Supp. 1974); DEL. CODE ANN. tit. 24 § 1791 (1975); FLA. STAT. ANN. § 458.22(5) (Supp. 1974); GA. CODE ANN. § 26-1202-(e) (Supp. 1974); HAWAII REV. STAT. § 453-16(d) (1974); IDAHO CODE § 18-612 (Supp. 1974); ILL. REV. STAT. ch. 38, § 81-16, ch. 91 § 201 (Smith-Hurd 1974); IND. CODE § 35-1-58.5 (1971); KAN. STAT. ANN. § 65-444 (1972); KY. REV. STAT. ANN. § 311.800(1) (Supp. 1974); LA. REV. STAT. §§ 40:1299.31-.33 (Supp. 1975); ME. REV. STAT. ANN. tit. 22 § 1572 (Supp. 1974); MD. ANN. CODE art. 43 § 556E (Supp. 1974); MASS. ANN. LAWS ch. 272, § 21B (1974); MICH. COMP. LAWS ANN. §§ 331.551-.556 (Supp. 1974); MINN. STAT. ANN. § 145.42 (Supp. 1974); MO. ANN. STAT. § 197.032 (Supp. 1975); MONT. REV. CODES ANN. § 69-5223 (Supp. 1974); NEB. REV. STAT. § 28-4, 156 (Supp. 1973); NEV. REV. STAT. § 449.191 (1973); N.J. STAT. ANN. §§ 2A:65A-1 to -4 (1975); N.M. STAT. ANN. § 40A-5-2 (1972); N.Y. CIVIL RIGHTS LAW § 79-i (McKinney Supp. 1974); N.C. GEN. STAT. § 14-45.1(f)

issue of the constitutionality of such statutes has so far escaped widespread judicial scrutiny.

Utah's Abortion Act of 1973,¹³ which contained a conscience clause provision¹⁴ authorizing hospitals to refuse to admit abortion patients, was found unconstitutional by a federal district court as "broad enough to make an abortion impossible to obtain or perform in any trimester of pregnancy. . . ."¹⁵ The court based its conclusion on the combined effect of the conscience clause and a collateral requirement that abortions be performed only by licensed physicians.¹⁶

A statutory conscience clause in Nebraska¹⁷ was held unconstitutional as to "public" hospitals by a federal district court in *Orr v. Koefoot*,¹⁸ but the court expressly noted that such a provision might be valid in some circumstances.¹⁹

III. IMPLICATIONS OF WADE AND BOLTON

Fundamental to any consideration of abortion regulation by the states is an understanding of the constitutional standards enumerated by the Supreme Court in the *Wade* and *Bolton* decisions.²⁰ It is, therefore, useful to consider the portions of those opinions which are pertinent to the issue of the constitutionality of state-enacted "conscience clause" legislation.

(Supp. 1974); N.D. CENT. CODE § 23-16-14 (Supp. 1973); ORE. REV. STAT. § 435.475 (1971); PA. STAT. ANN. tit. 43, § 955.2 (Supp. 1974); S.C. CODE ANN. §§ 32-684, 32-685 (Supp. 1974); S.D. COMP. LAWS ANN. § 34-23A-14 (Supp. 1974); TENN. CODE ANN. § 39-304 (Supp. 1974); UTAH CODE ANN. § 76-7-306 (Supp. 1974); WIS. STAT. ANN. §§ 140.42, 441.06, 448.06 (Supp. 1974); WYO. STAT. ANN. § 6-77.2 (Supp. 1973).

¹³ UTAH CODE ANN. §§ 76-7-301 to -320 (Supp. 1973).

¹⁴ UTAH CODE ANN. § 76-7-306 (Supp. 1973).

¹⁵ *Doe v. Rampton*, 366 F. Supp. 189, 193 (D. Utah 1973). The Utah provision can be distinguished from the Michigan statute in that it was redundantly made applicable to any "hospital," "private hospital," and "denominational hospital." The court expressly rejected what it considered to be an

open and untraditional invitation for the court to examine the Act word by word, to edit the Act, and to save as much as possible of its substance so as to preserve a highly restrictive Act.

Id. at 198 (Lewis, J., concurring). However, it should be noted that the opportunity to preserve as much as possible of a restrictive abortion statute was expressly recognized and seized by the Michigan Supreme Court in the *Bricker* decision. 389 Mich. 524, 531, 208 N.W.2d 172, 176 (1973). See note 11 *supra*.

¹⁶ Michigan also has such a requirement. See *People v. Bricker*, 389 Mich. 524, 531, 208 N.W.2d 172, 176 (1973).

¹⁷ NEB. REV. STAT. § 28-4,156 (Supp. 1973).

¹⁸ 377 F. Supp. 673 (D. Neb. 1974).

¹⁹ *Id.* at 683. The court chose not to identify situations in which such a provision might be constitutional.

²⁰ For a more thorough consideration of the entire scope of the *Wade* and *Bolton* holdings, see Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 921 (1973).

In *Wade*, the Court recognized a fundamental right of privacy²¹ which it found to be "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²² Limitations of this right by the state are therefore permissible *only* on a showing of a "compelling state interest."²³ Balancing the woman's right of privacy against recognized legitimate state interests in the abortion decision, the Court developed a three-part formula for constitutionally permissible state regulation of abortion.²⁴

The *Bolton* decision further limited state regulation of abortion by precluding the state from imposing regulations which, though ostensibly related to a legitimate "compelling state interest," impose a greater degree of limitation on a woman's right of privacy than is necessary to serve the state interest involved and thus "unduly restrict" the woman's rights.²⁵

The Court in *Bolton* noted the existence of a conscience clause provision in the Georgia abortion statutes,²⁶ but its somewhat cursory consideration of the clause raised more questions than it answered. The Court considered whether the conscience clause rendered a concurrent statutory requirement of approval of a hospital committee prior to performance of an abortion in that hospital²⁷ unnecessary.²⁸ The Court noted that the committee approval requirement served a "protective" function in enabling the hospital to assure itself that its actions were within "legal requirements."²⁹ However, that function was found un-

²¹ 410 U.S. at 152-53. The Court preferred to find the right of privacy in the fourteenth amendment concept of personal liberty but expressly noted that individual Justices (and the Court itself) have also identified as sources for this right the first, fourth, fifth, and ninth amendments, as well as the general penumbra of the Bill of Rights.

²² *Id.* at 153.

²³ *Id.* at 155-56. The Court recognized as legitimate state interests both the protection of maternal health and preservation of the life of the fetus, but it held that these interests do not become "compelling" until "approximately the end of the first trimester" of pregnancy and the point of "viability." *Id.* at 159-63.

²⁴ *Id.* at 164-65. During the first trimester of pregnancy the state can not regulate abortions (except to limit the performance of them to licensed physicians). After the first trimester, the state may impose regulations reasonably related to the health of the pregnant woman. Finally, after viability, the state may regulate abortions even to the extent of proscribing them (except where necessary, in appropriate medical judgment, to the preservation of the life or health of the mother).

²⁵ 410 U.S. at 197-98. The Court found a Georgia statute requiring approval of a hospital committee of medical staff prior to performance of an abortion to be redundant since the protection of potential life is adequately served by the *Wade* requirement of the concurrence of a physician. GA. CODE ANN. § 26-1202-b(5) (Revision 1971).

²⁶ GA. CODE ANN. § 26-1202-(e) (Revision 1972).

²⁷ GA. CODE ANN. § 26-1202-(b)(5) (Revision 1972).

²⁸ 410 U.S. at 197. The significance of such a finding would be to render the unnecessary regulation unconstitutional as "unduly restrictive" of the rights of the pregnant woman. See note 25 and accompanying text *supra*.

²⁹ 410 U.S. at 197. The Court also recognized the protection of maternal and fetal health as possible functions of the committee approval requirement but found this function "basically redundant." *Id.* See note 25 *supra*.

necessary since "the hospital itself is otherwise fully protected"³⁰ under the Georgia conscience clause statute, which asserts, "Nothing in this section shall require a hospital to admit any patient . . . for the purpose of performing an abortion. . . ."³¹ Since the function of the committee approval requirement was already performed by the conscience clause, the approval requirement was held to be unconstitutional.³²

There is an apparent gap in the Court's reasoning, however. Since the Court was considering the constitutionality of the committee approval requirement in general rather than as applied to a specific institution, the requirement could be found completely unnecessary and therefore totally invalid only if the "protection" afforded by the conscience clause was seen as extending to *all* hospitals in the state. But the *Wade* requirements have been consistently held to render such conscience clause provisions ineffective as to "public" hospitals,³³ a proposition which would seem to preclude the Court's finding of *total* invalidity of the committee approval requirement.

The Court added to the confusion as to the constitutional scope of conscience clauses in dictum made in reference to the Georgia statute. The Court stated, without citing any support for the proposition, "These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the *denominational* hospital."³⁴ Accepting the Court's unexplained assertion that a statute which is *prima facie* applicable to *all* hospitals is intended to apply only to *denominational* hospitals, it is unclear how a conscience clause which *is not* applicable to all hospitals can render unnecessary another "protective" statute which *is* applicable to all hospitals.

It should be noted, moreover, that the power to refuse to admit abortion patients is an adequate legal "protection" *only* for hospitals which do not wish to perform abortions at all. The right to refuse admission is of little value to the hospital which does perform abortions but wishes to maintain an on-going check on the "legality" of the abortions performed.

This internal contradiction in the Court's construction of the Georgia statute is difficult to reconcile, regardless of the interpretation placed on the Supreme Court's apparent recognition of some form of

³⁰ *Id.*

³¹ GA. CODE ANN. § 26-1202-(e) (Revision 1972). The Georgia provision is essentially the same as the Michigan statute.

³² 410 U.S. at 198, 201.

³³ *Orr v. Koefoot*, 377 F. Supp. 673 (D. Neb. 1973); *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir. 1974) *appeal dismissed, cert. denied*, 95 S. Ct. 169 (1974); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973). See notes 72-74 *infra*.

³⁴ 410 U.S. at 198 (emphasis added).

a right of refusal of abortion patients in denominational hospitals.³⁵ At best, *Bolton* offers an implicit recognition that such state statutes are not wholly unconstitutional,³⁶ but the opinion offers no explanation of the nature of the "protective" effect it construes the statute to have. Similarly, no language suggests the constitutionally permissible scope of such a statute. While a conclusive resolution of these unsettled issues will doubtless have to await the renewed attention of the Supreme Court,³⁷ the possible modes of that resolution and the ramifications thereof will be the focus of this article.

IV. RIGHT TO REFUSE ABSENT A CONSCIENCE CLAUSE

Even absent a conscience clause, there are several grounds on which at least two of the classes of hospitals under consideration could arguably have a right to refuse to admit abortion patients.

A. Denominational Hospitals

The most logical basis for a nonstatutory right of denominational hospitals to refuse to admit abortion patients is the first admendment guarantee of "free exercise" of religion.³⁸ The first amendment approach favors such institutions in any balancing of the hospital's *express* constitutional right against the *implied* right of privacy³⁹ of a pregnant woman, especially if nondenominational facilities are available to the patient.⁴⁰ Moreover, in an effort to serve the public policy of encouraging the establishment of denominational hospitals, some

³⁵ The Court could conceivably have been construing the statute in one of several ways. See notes 80-101 and accompanying text *infra*. None of the possible interpretations, however, resolves the inconsistency of the *Bolton* treatment of Georgia's conscience clause.

³⁶ While not expressly treating the constitutionality of the statute, the Court failed to include it in the list of provisions which it did find unconstitutional. But there is an apparent consensus among federal courts that such statutes are at least partially unconstitutional. See note 33 *supra*.

³⁷ The Supreme Court has refused to hear any abortion cases since handing down the *Wade* and *Bolton* decisions, most recently denying certiorari in *Hale Hospital v. Doe*, 43 U.S.L.W. 3413 (U.S., Jan. 28, 1975). See note 40 *infra*, for the holding by the Court of Appeals of the First Circuit.

³⁸ Assertion of first amendment freedom of religion rights necessarily involves a determination of the constitutional scope of the term "religion." See *United States v. Ballard*, 322 U.S. 78 (1944); *United States v. Seeger*, 380 U.S. 163 (1965). Obviously, some distinction must be made between institutions whose refusal is grounded in philosophical or economic considerations from those genuinely based on religious tenets.

³⁹ The right of privacy is also of rather recent vintage, having been first recognized as a separate fundamental right by the Supreme Court in 1965. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁰ In *Doe v. Hale Hospital*, 500 F.2d 144, 146 (1st Cir. 1974), *cert. denied*, 43 U.S.L.W. 3413 (U.S., Jan. 28, 1975), the court rejected on the facts the hospital's contention that it was not substantially depriving a woman of her rights since alternative facilities were allegedly available, but the question of whether or not such an argument could prevail if factually sound was left open.

courts have accorded greater deference to such institutions than to other hospitals in applying *Wade* and *Bolton*.⁴¹

There are, however, difficulties with the proposition that the first amendment protects the denominational hospital's refusal to admit abortion patients. There is little authority directly supporting the proposition that such rights may be validly asserted by an institution on its own behalf.⁴² Moreover, constitutional rights are not absolute and can be subjected to state limitations where necessary to serve a legitimate public interest such as public health.⁴³ This sort of balancing would obviously tend to swing against the denominational hospital in geographic areas or particular situations where there are no alternative facilities for abortions.⁴⁴

Thus, in the absence of conscience clause legislation, the first amendment can be asserted as support for a hospital's right to refuse admission to abortion patients, but the amendment is useful only to truly "denominational" hospitals and may not provide an absolute right of refusal.

B. Private Hospitals

Since a "private" hospital⁴⁵ is by definition an institution which is not subject to the due process requirements of the fourteenth amend-

⁴¹ In *Allen v. Sisters of Saint Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973), a woman wanted to have a sterilization performed concurrently with her scheduled Caesarean delivery; transfer to another hospital was impractical because she was in traction from a prior accident. The court noted in dictum that the patient's inconvenience did not outweigh the public interest in protecting denominational hospitals' first amendment rights. *Id.* at 1214.

Similarly, in *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (D. Idaho 1973), the court, citing *Allen*, asserted that a denominational hospital cannot be forced to make its facilities available for operations to which it is religiously opposed. The court offered no authority for this assertion, however, and noted that there were wholly adequate alternative facilities available in which the plaintiff (a doctor) could perform the operations (sterilizations) objected to. *Id.* at 800, 803.

⁴² The standing of hospitals to assert first amendment rights was specifically challenged in *Bolton*, but the Court did not address itself to the issue in its opinion. See Brief for Appellants at 50 n.45, *Doe v. Bolton*, 410 U.S. 179 (1973). *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), could be construed as supporting assertion of first amendment rights by organizations but is distinguishable in that the Society asserted not its own rights, but those of injured parents. *Id.* at 535. But see *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 95, 107 (1952). However, since the individual can presumably refuse to participate in an abortion by personally invoking the first amendment, it seems questionable that it is really necessary to extend further protection to the denominational hospital which theoretically represents only the cumulative interests of persons whose religious beliefs are already individually protected.

⁴³ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (compulsory vaccination law); *Crowley v. Christensen*, 137 U.S. 86, 89 (1890).

⁴⁴ In *Taylor v. Saint Vincent's Hospital*, Civil No. 1090 (D. Mont., Nov. 1, 1972), reconsidered and rev'd. on jurisdictional grounds, 369 F. Supp. 948 (D. Mont. 1973), the court on facts essentially similar to *Allen* 361 F. Supp. 1212 (N.D. Tex. 1973) ordered a Catholic hospital to perform a sterilization operation.

⁴⁵ Note that a "denominational" hospital may also be a "private" hospital; however, circumstances may give even denominational hospitals public attributes. Cf. *Taylor*, Civil No. 1090 (D. Mont. Nov. 1, 1972), reconsidered and rev'd. on jurisdictional grounds, 369 F. Supp. 948 (D. Mont. 1973).

ment because it does not engage in "state action,"⁴⁶ such an institution is not required to admit abortion patients under *Wade*, which was grounded in due process considerations.⁴⁷

Accordingly, assertion of "private" status has tended to be the primary defense of hospitals not formally connected with a state agency or subdivision of the state⁴⁸ in response to actions seeking to compel them to make their facilities available for operations to which they are opposed. The courts have also tended to view the question of the legal duty of a given hospital to make its facilities available for performance of abortions or other operations as essentially a question of classifying it as either a "public" or "private" institution.⁴⁹

Therefore, absent explicit statutory regulation, a "private" hospital—whether denominational or not—is free to refuse admission to abortion patients.

C. Public Hospitals

Hospitals classified as "public" have been consistently held to be subject to the mandates of the fourteenth amendment.⁵⁰ Among the factors considered by the federal courts in classifying a hospital as "public" or "private" are (1) whether the hospital is owned by the state;⁵¹ (2) whether it is extensively regulated by the state;⁵² (3) whether it leases its facilities from the state;⁵³ (4) whether its governing board is appointed in whole or in part by local public officials;⁵⁴ (5) whether it is the only such facility in a given area;⁵⁵ and (6) whether

⁴⁶ See notes 50-69 and accompanying text *infra*, especially as to the effect that enactment of a conscience clause provision by the state may have on otherwise "private" hospitals.

⁴⁷ 410 U.S. at 164. However, the absence of jurisdiction is to be distinguished from a bona fide right to refuse admission to abortion patients.

⁴⁸ Those "formally connected" have typically included institutions owned by municipalities. See, e.g., *Nyberg v. City of Virginia*, 495 F.2d 1342, 1343 (8th Cir. 1974), *appeal dismissed, cert. denied*, —U.S.—, 95 S. Ct. 169 (1974); *Hathaway v. Worcester City Hospital*, 475 F.2d 701, 703 (1st Cir. 1973).

⁴⁹ See, e.g., *Doe v. Bellin*, 479 F.2d 756 (7th Cir. 1973); *Allen v. Sisters of St. Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973); *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (D. Idaho 1973). Significantly, all of these cases involved denominational hospitals, although in each case the court based its holding on a finding of no state action (the latter two opinions offering in dictum comments of the significance of the denominational status).

⁵⁰ See, e.g., *McCabe v. Nassau County Medical Center*, 453 F.2d 698, 703 (2d Cir. 1971).

⁵¹ *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 703 (1st Cir. 1973); *Nyberg v. City of Virginia*, 495 F.2d 1342, 1343 (8th Cir. 1974), *appeal dismissed, cert. denied*, —U.S.—, 95 S. Ct. 169 (1974).

⁵² *McCabe v. Nassau County Medical Center*, 453 F.2d 698, 703 (2d Cir. 1971). As to conscience clause provisions as a state regulation, see notes 63-69 *infra*.

⁵³ *O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1142 (6th Cir. 1973). Cf. *Abernathy v. City of Irvine*, 355 S.W.2d 159 (Ky. 1961), *cert. denied*, 371 U.S. 831 (1962).

⁵⁴ *Chiaffitelli v. Dettmer Hosp. Inc.*, 437 F.2d 429, 430 (6th Cir. 1971); *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 174 (5th Cir. 1971).

⁵⁵ *O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1142 (6th Cir. 1973); *Meredith v. Allen County War Memorial Hospital Comm'n*, 397 F.2d 33, 35 (6th Cir. 1968). Particularly in this situation, it may plausibly be contended that the hospital is performing a

it has received public funding.⁵⁶ Judicial treatment of these factors, however, has been far from uniform. In large measure, this lack of uniformity in application of the criteria for determining whether a hospital is "public" or "private" can be attributed to the apparent reticence of the courts to deal with the question of whether denominational hospitals have a *right* to refuse to admit abortion patients;⁵⁷ the result has often been that the "private"- "public" dichotomy used to justify a court's holding may not reflect all of the factors upon which the holding turned.⁵⁸

However, as to hospitals held to be subject to the fourteenth amendment, the courts have shown a much greater degree of accord as to the restrictions placed on such institutions by *Wade* and *Bolton*.⁵⁹ It has been uniformly held that neither a state nor a "public" hospital may constitutionally impose on the abortion procedure any regulations which prohibit elective abortions during the first trimester of pregnancy,⁶⁰ impose arbitrary limits on the number of abortions to be

"public function" of a nature which brings it within the auspices of the fourteenth amendment. *See, e.g.*, *Evans v. Newton*, 382 U.S. 296, 299 (1966) (operating park); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (governing company town). This rationale might be particularly persuasive if combined with an express statutory obligation on the state to be responsible for the health of its citizens. *See* MICH. CONST. art. 4, § 51.

⁵⁶ *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 967 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Citta v. Delaware Valley Hospital*, 313 F. Supp. 301, 307 (E.D. Pa. 1970). *But see Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973) (distinguishing general receipt of state funding from funding which represents a direct government involvement in the challenged activity). Both *Simkins* and *Bellin* involved hospitals receiving federal and state funds under the Hospital Survey and Construction Act (Hill-Burton Act), 42 U.S.C. §§ 291-291d (1970). The judicial controversy as to the effect of receipt of Hill-Burton funds resulted in the passage by Congress of Title IV, § 401(b)(2)(A), (Section 401) of the Health Programs Extension Act of 1973, Pub. L. No. 93-45 (June 18, 1973). This statute expressly provides that receipt of Hill-Burton funds does not authorize a court to require any "entity" receiving such funding to make its facilities available for the performance of either sterilizations or abortions if the "entity" objects to the performance of such operations on the basis of religious beliefs or moral convictions. This has generally been interpreted by the courts as settling the issue, at least as to Hill-Burton funding. *Taylor v. St. Vincent's Hospital*, Civil No. 1090 (D. Mont., Nov. 1, 1972), *reconsidered and rev'd. on jurisdictional grounds*, 369 F. Supp. 948 (D. Mont. 1973); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974). However, there are serious questions about the constitutionality of the provision. *See Note, Hill-Burton Hospitals After Roe and Doe: Can Federally Funded Hospitals Refuse to Perform Abortions?* 4 N.Y.U. REV. L. & SOC. CHANGE 83 (1974).

⁵⁷ There is no case directly establishing either the presence or nature of such a right, although the *Bolton* dictum is often cited. The judiciary seems determined to await clarification of these statements from the Supreme Court before basing any holdings on them. *See* notes 25-37 *supra*.

⁵⁸ *See* note 49 *supra*.

⁵⁹ The application of the *Wade* and *Bolton* requirements to a given institution does not vary substantively with the nature of the nexus employed to invoke the fourteenth amendment.

⁶⁰ *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Doe v. Bolton*, 410 U.S. 179, 195 (1973); *Doe v. Hale Hosp.*, 500 F.2d 144, 147 (1st Cir. 1974), *cert. denied*, 43 U.S.L.W. 3413 (U.S., Jan. 28, 1975); *Nyberg v. City of Virginia*, 495 F.2d 1342, 1345 (8th Cir. 1974), *appeal dismissed, cert. denied*, —U.S.—, 95 S. Ct. 169 (1974); *Doe v. Rampton*, 366 F. Supp. 189, 193 (D. Utah 1973).

performed (without a compelling reason),⁶¹ or "unduly restrict" the performance of abortions with regulations which make obtaining or performing an abortion burdensome.⁶²

It is important to remember that an otherwise "private" entity can be made subject to the provisions of the fourteenth amendment by a judicial finding of state action stemming from conduct of the state which is wholly independent of the conduct of the "private" entity. In *Reitman v. Mulkey*,⁶³ the Supreme Court found that the passage of a state constitutional amendment which had the effect of repealing prior anti-discrimination-in-housing laws was sufficient state action to impose the equal protection provision of the fourteenth amendment on an otherwise "private" transaction between private individuals. The Court noted that state conduct "encouraging" or "authorizing" private conduct which contravenes constitutional guarantees can be a sufficient state action to impose fourteenth amendment restrictions on that otherwise "private" conduct.⁶⁴ Application of this doctrine to hospitals would greatly jeopardize the immunity of "private" hospitals from the *Wade* and *Bolton* due process requirements, since such hospitals would no longer have exclusive control over the factors which determine whether or not they are immune.⁶⁵

This type of approach to imposition of the fourteenth amendment was urged in *Doe v. Bellin*,⁶⁶ a case involving a denominational hospital. It was argued that state regulation and funding of hospitals constituted a state action sufficient to require the hospital involved to conform to *Wade* and *Bolton*. The Seventh Circuit rejected the contention on the facts of the case but recognized the validity of the concept and enumerated a set of criteria for its successful invocation.⁶⁷ Although there is some question as to whether the criteria announced in *Bellin* are overly restrictive,⁶⁸ the court's acknowledgment of the

⁶¹ *Ott v. Koefoot*, 377 F. Supp. 673, 682-83 (D. Neb. 1974).

⁶² *Doe v. Bolton*, 410 U.S. 179, 198 (1973); *Doe v. Rampton*, 366 F. Supp. 189, 193 (D. Utah 1973).

⁶³ 387 U.S. 369 (1967). See also *Hunter v. Erickson*, 393 U.S. 385 (1969) (city charter repealing fair housing ordinance held unconstitutional); *Peterson v. Greenville*, 373 U.S. 244, 248 (1963) (city ordinance requiring private discrimination); *Lombard v. Louisiana*, 373 U.S. 267, 273 (1963) (statements by city officials favoring private discrimination).

⁶⁴ 387 U.S. at 375.

⁶⁵ This is in contrast with the strict "public"-/"private" dichotomy, in which the hospital retains control over nearly all of the factors which determine its status. See notes 50-56 *supra*.

⁶⁶ *Doe v. Bellin Memorial Hosp.*, 479 F.2d 756 (7th Cir. 1973). The plaintiff brought suit under 42 U.S.C. § 1983 (1970), which authorizes civil suits to redress deprivation of constitutional rights by persons acting "under color of" state law.

⁶⁷ 479 F.2d at 761. See note 68 *infra*.

⁶⁸ The *Bellin* court cited its previous holding in *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972), in which it stated:

The "under color of" provision encompasses only such private conduct as is supported by state action. That support may take various forms but it is quite

concept that independent state conduct can create state action to be applied to otherwise "private" parties⁶⁹ may be an omen of a trend in abortion refusal litigation.

V. EFFECT OF THE MICHIGAN CONSCIENCE CLAUSE

The previous discussion has assumed the absence of a statutory conscience clause of the type enacted in Michigan.⁷⁰ When this factor is added, the list of unsettled questions grows rapidly, and predictions of results become almost completely speculative.⁷¹

clear that a private person does not act under color of state law unless he derives some "aid, comfort, or incentive," either real or apparent, from the state. Absent such affirmative support, the statute is inapplicable to private conduct.

We believe that affirmative support must be significant, measured either by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy, to bring the statute into play.

Id. at 654-56.

It should be noted in conjunction with these criteria that the Seventh Circuit made the somewhat original assertion in *Lucas* that a different standard of state action is employed in the determination of jurisdiction under 42 U.S.C. § 1983 that is employed in the corresponding jurisdictional determination for a suit simply alleging a prima facie violation of the fourteenth amendment. *Id.* at 645-47, 654-57. *Contra*, *United States v. Price*, 383 U.S. 787, 794 n.7 (1966); *see* *Browns v. Mitchell*, 409 F.2d 593-95 (10th Cir. 1969); *Greco v. Orange Memorial Hosp. Corp.*, 374 F. Supp. 227 (E.D. Tex. 1974). The Seventh Circuit's application of its dichotomous state action standard to the cases at hand, however, is hardly consistent enough to allow analysis of its substantive effect. For instance, the court in *Lucas* distinguished *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1967), as not involving a 42 U.S.C. § 1983 type of state action:

Whereas the primary focus of the constitutional prohibition [fourteenth amendment] is upon action of the state, the statutory prohibition [42 U.S.C. § 1983] encompasses private conduct, the effectiveness of which is in part attributable to the fact that it derives support, or at least the semblance of validity, from a state law or custom. Neither *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L. Ed. 2d 45, nor *Public Utilities Commission v. Pollak*, 343 U.S. 451, 72 S.Ct. 831, 96 L. Ed. 1068, arose under § 1983 or involved a consideration of when private conduct is "under color of" state law within the meaning of that statute.

Id. at 646.

But the same court cited the *Burton* state action criteria in its determination that § 1983 state action is not present in *Bellin Memorial Hospital*. *Doe v. Bellin Memorial Hospital*, 479 F.2d at 761. While the *Lucas* opinion seems internally consistent, if somewhat unprecedented, the application of its holding to *Bellin* is at best confusing.

If a particular hospital can be compelled to observe fourteenth amendment rights of others under either the "constitutional" or "statutory" remedy, it may not be significant whether their respective state action criteria are identical or not.

⁶⁹ For a more thorough consideration of the Supreme Court's position on the "state action" question, *see* Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 88 (1967).

⁷⁰ MICH. COMP. LAWS ANN. §§ 331.551-.556 (Supp. 1974).

⁷¹ The courts have not been unaware of this; not a single case since *Wade* and *Bolton* has based its holding squarely on the effect of such a provision. *See also* note 49 *supra*.

A. Overbreadth

Under *Wade*, a conscience clause is prima facie unconstitutional to the extent that it applies to the first trimester of pregnancy.⁷² Federal district courts have held such statutory provisions unconstitutional as to "public" hospitals in *Doe v. Rampton*⁷³ and *Orr v. Koefoot*;⁷⁴ there is no case authority to the contrary.

The Michigan statute is, therefore, obviously overbroad, but it is by no means clear that the Act is completely invalid. The *Rampton* court invalidated the entire Utah conscience clause, but there are significant distinctions between the express provisions of the Utah and Michigan statutes⁷⁵ and between the legislative histories behind their passage.⁷⁶ The *Koefoot* court simply held the Nebraska provision to be ineffective as to "public" hospitals, expressly declining to find it entirely "constitutionally infirm."⁷⁷ The trend of the cases seems to suggest that the latter treatment is likely to prevail, due to a combination of judicial deference to the conscience clause dictum of *Bolton*⁷⁸ and an unwillingness to interpret that dictum further in light of its confusing internal inconsistencies.⁷⁹

B. Possible Interpretations and Their Potential Collateral Effects

The presence of a statutory conscience clause will undoubtedly affect the legal ability of the three classes of hospitals under consideration to refuse to admit abortion patients. However, the nature and extent of that effect depend on the precise legal construction ultimately accorded such statutes. Such provisions can arguably be construed as (1) completely unconstitutional, (2) effective to create a statutory right of refusal in denominational hospitals only, (3) effective merely to protect hospitals from civil liability for refusing to admit abortion patients, or (4) merely a codification of existing first amendment rights.

1. *Conscience Clauses as Completely Unconstitutional*—There is

⁷² 410 U.S. at 163. See note 24 *supra*.

⁷³ 366 F. Supp. 189, 193 (D. Utah 1973).

⁷⁴ 377 F. Supp. 673, 683 (D. Neb. 1973).

⁷⁵ See note 15 *supra*.

⁷⁶ See note 15 *supra*. The occasional judicial willingness to consider legislative motive as a ground for invalidation of statutory enactments is obviously a very subjective determination, the outcome of which does not lend itself to reliable prediction. For an evaluation by the Michigan Supreme Court of the state's public policy as to abortion regulation, see *People v. Bricker*, 389 Mich. 524, 531, 208 N.W.2d 172, 176 (1973).

⁷⁷ *Orr v. Koefoot*, 377 F. Supp. 673, 683 n.13 (D. Neb. 1973).

⁷⁸ See notes 25-37 and accompanying text *supra*.

⁷⁹ *Id.*

precedent for total invalidation of conscience clauses,⁸⁰ on the theory that an abortion would be "impossible to obtain in any trimester of pregnancy" if a state on the one hand imposed requirements which had the effect of forcing pregnant women to employ state-licensed physicians and facilities and, simultaneously, provided that all such physicians and hospitals could withhold their services.⁸¹ However, in view of the fact that under the fourteenth amendment "public" hospitals can never refuse admission to abortion patients, such a rationale would be unlikely to prevail unless convincing proof of an acutely inadequate supply of "public" hospitals to meet the anticipated needs of the state's population could be shown.⁸²

2. *Conscience Clauses as Creating a Statutory Right of Refusal in Denominational Hospitals*—In light of the relevant dictum in *Bolton*,⁸³ conscience clauses could be construed to create a statutory right in denominational hospitals to refuse to admit abortion patients. This would provide the "protection" to the denominational hospitals which the *Bolton* opinion discussed and would most nearly comport with the prima facie legislative intent behind their passage. There are, however, some serious constitutional obstacles to such an interpretation.

Since it has been generally accepted that conscience clauses do not protect "public" hospitals from the requirements of the fourteenth amendment and the *Wade* criteria for abortion regulation, a right of refusal in denominational hospitals would seem to require a corollary conclusive presumption that a denominational hospital can *never* be a "public" hospital (or otherwise be made subject to the fourteenth amendment under the *Reitman v. Mulkey* state action theory) for purposes of abortion refusal.⁸⁴ Implicitly embodying such a presumption in a conscience clause statute would constitute a legislative attempt to dictate constitutional interpretation to the courts, a patently impermissible legislative objective.⁸⁵ The determination of the scope of state action, and hence, of the scope of the *Wade-Bolton* criteria, is an exclusively judicial function, and the courts are not bound by any legislative classification they find to be unsound.

⁸⁰ *Doe v. Rampton*, 366 F. Supp. 189, 193 (D. Utah 1973).

⁸¹ *Id.* at 193.

⁸² Geographic scarcity of medical facilities has also been considered generally to be a factor in determining the "public" or "private" status of a given hospital. See note 55 *supra*.

⁸³ See notes 25-37 and accompanying text *supra*.

⁸⁴ See note 63 and accompanying text *supra*.

⁸⁵ See *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). It could be argued that Congress might have the power to validly dictate the interpretation of state action under the rationale of *Katzenbach v. Morgan*, 384 U.S. 641 (1966). But *Morgan* was expressly limited to expansive interpretations by Congress, the Court stating that Congress has "no power to restrict, abrogate, or dilute" the fourteenth amendment guarantees. *Id.* at 651, n.10. And, obviously, a state legislature is completely without power to do so.

Moreover, two courts have held that under *Wade* and *Bolton* a state may not delegate authority to regulate abortions which it does not itself possess.⁸⁶ Judicial adoption of such a view would also prevent a state from actually creating a right of refusal in denominational hospitals.

Finally, it can be argued that since the individual's right to refuse to participate in an abortion is protected independent of conscience clause legislation, a further extension of immunity to the denominational hospital itself constitutes both a deprivation of the first amendment freedom of religion rights of those who believe in abortion⁸⁷ and a violation of the "establishment" clause of the first amendment.⁸⁸

Even if it is assumed that the state can validly create a statutory right in denominational hospitals to refuse to admit abortion patients, it is likely that denominational institutions claiming their right to refuse under the conscience clause statute would be met with the contention that they are nevertheless subject to the fourteenth amendment under the *Reitman v. Mulkey* concept of state action by independent conduct of the state.⁸⁹ Under this theory, the legislative "authorization" represented by the state's independent act of enacting the conscience clause would constitute a sufficient state action to impose the *Wade-Bolton* due process requirements on denominational hospitals (whose subsequent refusal to admit abortion patients would be characterized as conduct "encouraged" by the state, under the *Reitman* rationale).⁹⁰ Even under the restrictive criteria enumerated by the *Bellin* court,⁹¹ the "affirmative support" of the state for the "private" conduct of the hospital would seem more than adequate to impart jurisdiction.⁹² If

⁸⁶ *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1973); *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1973). Both cases involved state-imposed "consent" requirements (from spouse or parent of minor) for an abortion.

⁸⁷ This obviously requires a determination of the validity of the beliefs of those claiming abortion to be within their religious tenets. See note 38 *supra*. While it is unlikely that a person could successfully assert abortion *per se* to be a religious belief, abortion might be construed as a necessary means to a valid religious end, such as family planning or prevention of illegitimacy.

⁸⁸ See generally *Everson v. Board of Education*, 330 U.S. 1, 8-18 (1947); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁸⁹ See note 63 and accompanying text *supra*.

⁹⁰ *Id.* In the context of abortion refusal by a hospital, the independent state conduct of passage of a conscience clause will generally not be the *sole* basis for a finding of state action, but one of a number of factors which cumulatively amount to a significant state involvement in the hospital's conduct. Further, the state's independent acts need not be the actual motivation of the private actor's conduct to constitute a state action with respect to that conduct. See *Peterson v. Greenville*, 373 U.S. 244, 248 (1963).

⁹¹ See note 68 *supra*.

⁹² In *Bellin* the Seventh Circuit suggested, in dictum, that a conscience clause provision would not be unconstitutional because

if a state is completely neutral on the question whether private hospitals shall

this occurred, the denominational hospital's only recourse to escape imposition of the fourteenth amendment and the *Wade-Bolton* requirements would be to base its refusal solely on its first amendment defense.⁹³

It could also be argued that such an interpretation of the conscience clause could impose fourteenth amendment responsibilities on non-denominational "private" hospitals, since the statute itself is so broadly worded, but such an argument is unlikely to prevail if the conscience clause is construed to be effective over denominational hospitals only (since the nondenominational hospitals' refusal would be based not on the statute, but on its immunity derived from its "private" status).⁹⁴

Finally, if the right of refusal in a denominational hospital is conferred by the statute, then the protection afforded is necessarily subject to the evanescence frequently characteristic of emotionally charged legislative enactments.

3. Conscience Clauses as Mere Exemptions from Civil Liability— An express exemption from civil liability for damage claims based on a hospital's refusal to admit an abortion patient is a feature common to both the Michigan conscience clause and the Georgia statute under consideration under *Bolton*.⁹⁵ This exemption from damage claims could be interpreted to provide the "protection" of which the *Bolton* opinion deemed the statute capable, even if the statute were found to be ineffective to create a right of refusal in denominational hospitals. To construe this as the sole effect of the statute, however, would require the anomalous conclusion that such institutions could with

perform abortions, the state may expressly authorize such hospitals to answer that question for themselves.

Doe v. Bellin Memorial Hosp., 479 F.2d 756, 760 (7th Cir. 1973). However, it can be argued that this merely restates the obvious fact that "private" hospitals are not subject to the fourteenth amendment.

Moreover, for the state's conscience clause to in fact be "neutral," it would of necessity be ineffective to *create* any right of refusal in any hospital. If the conscience clause is no more than a state pronouncement of neutrality, it is difficult to imagine how it can provide the "protection" to denominational hospitals which *Bolton* (which was the Seventh Circuit's sole authority for its interpretation of the conscience clause issue) expressly indicates that such statutes provide.

Finally, it should be noted that even if the statute is "neutral" in the sense of not creating any rights, the *Reitman v. Mulkey* state action doctrine could still apply, since the rationale of that case has also been applied to *prima facie* "neutral" statutory provisions. See *Hunter v. Erickson*, 393 U.S. 385, 389-90 (1969).

⁹³ Perhaps there is no advantage to the first amendment defense; in any event the outcome will probably rest on a balancing of the respective rights of the hospital (either statutory or constitutional) and of the pregnant woman, in light of such factors as the availability of adequate alternative facilities, available staff, and public needs.

⁹⁴ This would yield the anomalous result of imposing the *Wade-Bolton* requirements only on the entity (denominational hospitals) specifically intended to be exempted.

⁹⁵ GA. CODE ANN. § 26-1202-(e) (Revision 1972). See also MICH. COMP. LAWS ANN. § 331.551 (Supp. 1974), which contains a similar disclaimer.

pecuniary impunity do that (arbitrarily refuse admission to abortion patients) which they would have no right to do, and which the state could not empower them to rightfully do.⁹⁶

Moreover, such state "involvement" in the hospital's refusal would also be likely to meet even the narrow *Bellin* state action criteria,⁹⁷ leading to imposition of the *Wade-Bolton* criteria forbidding such arbitrary refusals.

4. Conscience Clauses as Mere Codifications of Existing First Amendment Rights—It is also possible to interpret conscience clauses as statutory codifications of the existing first amendment rights of denominational hospitals to refuse admission to abortion patients.⁹⁸ While such statutes might seem somewhat superfluous, it should be remembered that denominational hospitals may lack standing to assert first amendment rights,⁹⁹ a conscience clause statute could, therefore, be a legislative authorization of the standing of such institutions.¹⁰⁰

However, as previously noted, the first amendment, even if available to the hospital, would not offer an absolute guarantee of immunity;¹⁰¹ the hospital would still be subject to the balancing of respective interests which generally accompanies judicial accommodation of conflicting constitutional rights. But the denominational hospital which could claim first amendment protection would certainly be in a more advantageous position than the nondenominational "private" hospital, which could not claim a first amendment defense.

VI. CONCLUSION

The Michigan conscience clause statute¹⁰² represents the increasingly widespread legislative reaction to public concern for the rights of individuals and institutions religiously or morally opposed to abortion. The legal effect of such statutes, however, is still largely undetermined. The Supreme Court's only treatment of conscience clauses was at best inconclusive as to both their constitutional scope and legal effect, and the courts have subsequently been unwilling to clarify these issues.

⁹⁶ Such an interpretation would also involve an obvious conflict with 42 U.S.C. § 1983. See note 66 *supra*.

⁹⁷ See note 68 *supra*.

⁹⁸ See part IV A *supra*.

⁹⁹ See note 42 *supra*.

¹⁰⁰ This again raises the question of whether or not such an interpretation would amount to a legislative foray into the judicial sphere of constitutional interpretation in violation of the separation of powers principle. See note 85 *supra*.

¹⁰¹ See note 43 and accompanying text *supra*.

¹⁰² MICH. COMP. LAWS ANN. §§ 331.551-.556 (Supp. 1974).

The trend of the post-*Wade* and -*Bolton* cases seems to suggest that conscience clauses may enhance the legal position of non-“public” hospitals which refuse to admit abortion patients, but the nature and extent of their effect remain speculative. Some of the possible alternatives have been raised in this note, but a resolution of these questions will not be possible until they have been thoroughly considered and interpreted by a court sensitive to the conflicting rights and policies which underlie the statutes themselves.

—G. Michael White